2. On June 18, 1975, SCB applied for a construction permit to modify DPLMRS station KKI454 at Houma, Louisiana (the Houma application), to replace equipment, add channels, change power, and to furnish IMTS. Radiofone filed a petition to deny the application, and responsive pleadings have been filed thereto.

3. Radiofone later filed supplements to the petitions to deny on October 11, 1977, and December 12, 1977. Responsive pleadings were filed thereto.

4. The following issues are raised for our consideration:

(a) whether SCB has demonstrated a public need for the proposed IMTS facilities;

(b) whether the proposed IMTS rates filed by SCB are compensatory and reasonable;

(c) whether the Communications Act requires that the Commission examine the allegations of anticompetitive practices and other matters raised by Radiofone (the jurisdiction issue); and

(d) whether SCB has engaged in anti-competitive practices.

5. The need issue. Radiofone questions the validity of one of the exhibits in the New Orleans application wherein SCB states there are 364 held applications for service. Radiofone alleges that these orders are for the manual service currently provided by SCB and do not demonstrate a need for IMTS, since the proposed rates for IMTS are approximately three times the current rate for manual service. SCB acknowledges that the 364 applications are not for IMTS service but argues that they demonstrate a need for additional channels.

6. We agree with Radiofone. The 364 held applications were for manual service, and there is no reason to conclude that the applications demonstrate a desire for or need of IMTS. SCB acknowledged, in testimony before the Louisiana Public Service Commission (PSC), that IMTS rates were not quoted to prospective users. 2/ Nor did SCB provide information as to the identity or occupation of those persons making service inquiries. SCB has not made a sufficient showing under the standards set forth in New York Telephone Co., 47 FCC 2d 488 (1974), recon. denied, 49 FCC 2d 264, aff'd sub nom. Pocket Phone Broadcast Service, Inc., 538 F.2d 447 (D.C. Cir. 1976); Long Island Paging, 30 FCC 2d 405 (Rev. Bd., 1971). We will therefore designate an issue to determine whether SCB has demonstrated a public need for the proposed New Orleans facilities. In the Houma application (Exhibit 18) SCB states it has 9 held orders for the Houma area. SCB does not indicate whether costs were quoted to the 9 potential subscribers or whether the held orders were for manual service or IMTS. Additionally, no information was submitted on the identity and occupation of persons, if any, who made service inquiries. The application also refers to expanding business enterprises in Houma, citing the oil industry, the fishing industry, and shipbuilding. No demographics or statistical evidence was submitted showing the nature and numbers of such businesses and industries. We conclude that the Houma application fails to demonstrate public need for the proposed facilities under the standards set forth in New York Telephone, supra. 2a/ We will therefore designate a need issue concerning the proposed Houma facilities. Since the information related to the need issue (for both the New Orleans facilities and the Houma facilities) is exclusively within the possession of the applicant we will place on SCB the burdens of proof and introduction of evidence. In addition, we are unable to conclude from the traffic load study submitted (Exhibit 18) that two additional channels are needed. We will therefore examine, as part of the need issue, whether the Houma application complies with the requirements of Rules Section 21.516. 3/

2/ Radiofone "Reply to Opposition to Petition to Deny," footnote, p. 7.

2a/ The applications submitted no evidence on the two other criteria listed in New York Telephone, supra, or any other evidence to demonstrate public need.

3/ Section 21.516 specifies the additional showing required with an application for assignment of additional channels.

7. The Proposed IMTS Rates. Radiofone contends that SCB has omitted filing a tariff, required in Item 41 of the New Orleans application, for the charges for the proposed service. 4/ Radiofone also contends that SCB has structured its charges for the proposed service so as to undercut Radiofone's charges for automatic dial service. In the proceeding before the Louisiana Public Service Commission, SCB refused to answer rate-related interrogatories on what Radiofone contends were highly questionable grounds (proprietary and confidential information). Radiofone charges that SCB has for years maintained the same rate for its manual service by subsidizing that service from the earnings of its local exchange and message toll services. Radiofone argues that SCB has proposed to charge lower IMTS rates than Radiofone, which will seriously affect the viability of Radiofone's business and undermine Radiofone's ability to compete with SCB. In addition Radiofone charges that the alleged cross-subsidization by SCB will frustrate the Commission's decision in Docket No. 8650 (the General Land Mobile Proceeding), 5/ one purpose of which was to foster the development of competitive communications common carrier systems.

8. SCB counters that the proposed IMTS service is intrastate in nature, so the proposed rates are beyond the Commission's jurisdiction. SCB contends that, although the Commission may have authority to examine certain rates questions in the context of a rulemaking, this is an application proceeding, not a rulemaking proceeding, so it is not appropriate for the Commission to inquire into rates or anticompetitive practices. SCB argues that the IMTS rate issues raised by Radiofone were properly brought before the Louisiana Public Service Commission (Louisiana PSC), in Docket No. U-12620, that the IMTS rates have been

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4/ SCB has subsequently submitted a schedule of proposed IMTS charges in its reply to the petition to deny.

5/ In Docket No. 8650, the Commission made its initial allocation of frequencies to both wireline common carriers and to radio common carriers for providing Domestic Public Land Mobile Radio Service.

approved, after hearing, by the Louisiana PSC, and the Commission is not presented with any lawful basis for disturbing the decision of the State Commission. SCB argues that Radiofone has not presented the cost factors involved to support its charges that the IMTS rates are noncompensatory.

9. The IMTS rates issue discussed above is integrally related to the jurisdiction issue. Before reaching a determination on the rates issue, we present immediately below the arguments which the parties have made concerning the jurisdiction issue. We will then dispose of both issues together.

10. The Jurisdiction Issue. The service proposed by SCB is primarily a local service, the rates of which are not normally subject to the Commission's jurisdiction. 6/

6/ Section 2(b) of the Communications Act provides:

> (b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication (continued on page 6)

Radiofone acknowledges this jurisdictional limit and nevertheless argues that Sections 308(b) 7/ and

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6/ (continued from page 5) service or radio communication service to mobile stations on land vehicles in Canada or Mexico, except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Section 221(b) of the Communications Act provides:

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

7/ Section 308(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 308(b)), provides:

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application (con't. on page 7)

309(a) 8/ of the Communications Act authorize and require the Commission to examine this matter since Radiofone has alleged to the Commission that the proposed rate will result in serious economic harm to Radiofone. The Commission, Radiofone urges, is also required by Section 309 of the Communications Act to investigate evidence of a reasonable possibility that anticompetitive activity may

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7/ (con't from page 6) and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

8/ Section 309(a) of the Communications Act of 1934, as amended (47 U.S.C. Section 309(a)), provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

result . . . ." 9/ Radiofone contends that Section 313 10/

9/ P. 6, Supplement to Petition to Deny Application.

10/ Section 313 of the Communications Act of 1934, as amended (47 U.S.C. Section 309(a)), provides:

> Application of Antitrust Laws;
> Refusal of Licenses and
> Permits in Certain Cases
>
> Sec. 313(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: Provided, however, that such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(con't on page 9)

of the Communications Act shows that Congress intended serious weight to be given to antitrust considerations and that regulatory agencies have a broad obligation to give high priority to antitrust matters. Radiofone concludes that the Commission must examine this matter, since Radiofone has charged that SCB's proposed rates are noncompensatory and thus anticompetitive in effect as well as a conspiracy in restraint of trade. SCB argues, on the other hand, that Radiofone's mere allegations of anticompetitive practices do not invoke the Commission's jurisdiction, Concerning Radiofone's claim of serious economic harm, SCB responds that Radiofone's business is thriving, so its economic viability has in no way been affected by the SCB rates, whether compensatory or not.

11. While the Commission has stated that it has "an obligation to consider allegations of anticompetitive practices under the broad public interest standard of the Communications Act," 11/ the Commission has also required that the petitioner present specific data to make out a threshold showing that the rates in question are anti-competitive as a predicate to FCC review. United Telephone Company of Ohio, 26 FCC 2d 417 (1970), Bonduel Telephone Company 12/.

10/ (con't from page 8)

> (b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

11/ Commonwealth Telephone Company, 61 FCC 2d 246 (1976).

12/ Memorandum Opinion and Order, FCC 78-247, 68 FCC 2d 497, released April 25, 1978.

12. In the instant case, Radiofone's listing of rates - which it charges are anticompetitively low - is unsupported by any cost analysis. Radiofone contends that the SCB rates for manual service have been noncompensatory for years. Similarly, Radiofone alleges that the SCB IMTS rates in Baton Rouge are not compensatory. In neither of these two complaints does Radiofone submit any cost factors to support its conclusion that the rates are noncompensatory. Finally, Radiofone challenges the IMTS rates which SCB proposes in New Orleans. Again, the complaint lists only rates and does not furnish any cost factors involved to support Radiofone's conclusion that the rates are noncompensatory. 13/ We find that Radiofone has failed to allege sufficient data, as required by United Telephone of Ohio, 26 FCC 2d 417 (1970), to present a prima facie case of anticompetitive rates.

13. Absent such a showing of unfair competition or unreasonable discrimination, the Commission has normally left the question of rates for intrastate services to state jurisdiction. Morrison Radio Relay Corp., 31 FCC 2d 612, 616 (1971). Since the proposed IMTS service is intrastate, we believe the Louisiana PSC is the proper forum for Radiofone's allegations (and calculations of cost factors) related to whether the proposed rates are compensatory. In its April 7, 1975, Order No. U-12620, denying Radiofone's Motion to Compel Answers, the Louisiana PSC stated that, "The (PSC) staff is available to any consumer against whom the rates apply to investigate the reasonableness thereof, or whether there is some arbitrary or discriminatory feature contained in a tariff." The PSC has accepted the proposed rates for filing. It has held itself out, however, to hear complaints from consumers once the IMTS has been implemented and actual rates can then be presented for consideration by the PSC. Radiofone has failed to demonstrate why the Commission should at this point disturb the State Commission's

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13/ Petition to Deny Application, filed October 30, 1974; Reply to Opposition to Supplement to Petition to Deny, filed December 12, 1977. While we recognize that most of the information required to support such charges is largely in the possession of SCB, we nevertheless require something more from a petitioner than unsupported accusations. Even employing the liberal standard established under United Telephone of Ohio, supra, the petitioner's showing is insufficient.

disposition of the IMTS rates issue. Thus, we believe, given the evidence before us now, that Radiofone's charges are not an appropriate subject for our review. Radiofone has made additional allegations of anticompetitive practices, which are discussed below. 14/

14. Anticompetitive Practices of SCB. Radiofone alleges that SCB twice refused to furnish Radiofone selector level interconnection, falsely claiming that it was unavailable. 15/ To support this allegation, Radiofone submits two letters from SCB to Radiofone. In the first letter dated November 12, 1970, SCB informed Radiofone:

> In reference to our previous conversation on I.M.T.S. . . . for

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14/ Radiofone's reliance on the General Land Mobile Proceeding, Docket No. 8658, is misplaced. Radiofone argues that "no RCC can effectively compete with a telephone company which customarily undercuts its rates and which never has to prove to this Commission the justness and reasonableness of such lower rates." Docket No. 8658, however, was not intended to modify or restrict the jurisdiction of the Louisiana PSC over questions of intrastate rates in Louisiana. As discussed above, Radiofone's allegations do not establish a prima facie case of anticompetitive practices such that the public interest requires that the Commission examine the "justness" of SCB's IMTS rates.

15/ Selector level interconnection is a trunking arrangement whereby a group of telephone lines or channels are shared to handle calls for a large number of mobile units. (The selector level equipment processes a call at the stage between the telephone company's control office and the DPLMRS licensee's control terminal). The alternative approach, using line-per-station equipment, dedicates a single line or channel for each mobile unit, which is billed separately for its assigned line. The latter approach is more expensive and involves a less efficient use of telephone lines. The furnishing by SCB of selector level interconnection was an integral part of Radiofone's plans to furnish IMTS. Without selector level interconnection, Radiofone claims, it became necessary to go the more costly route of installing line-per-station equipment, which forced Radiofone

(continued on page 12)

> Radiofone . . . the Telephone Company does not now provide, nor anticipate providing interconnection arrangements for outpulsing type I.M.T.S. 16/

On June 26, 1972, SCB informed Radiofone:

> With respect to IMTS, "Improved Mobile Telephone Service" is not available on an outpulsing basis to Miscellaneous Common Carriers . . . . This information was transmitted to you in a letter dated July 23, 1970, signed by Mr. R. E. Nelson, District Sales Manager.

On May 15, 1974, SCB informed the Louisiana PSC:

> In 1971, the Bell System and South Central Bell set an objective to convert all manual and flat rate dial mobile systems to the newer type mobile service referred to as Improved Mobile Telephone Service (IMTS), ... Our progress towards implementation of Improved Mobile Telephone Service for Louisiana has been delayed in past years by our earnings situation, inadequate monthly rates for mobile service and our inability to devote capital to anything other than the provision of basic telephone service. We are now, however, preparing to proceed with a state-wide IMTS program beginning in 1975 and completing in 1977 . . . . Shown below is the rating structure contained in the enclosed tariff. (Emphasis supplied.)

15/ (continued from page 11)

to charge substantially higher IMTS rates. In the "Supplement of Petition to Deny," Radiofone further alleges that its charges of anticompetitive practices are substantiated in Baton Rouge, Louisiana, where SCB has allegedly used the same tactics against Radiofone's affiliate, Mobilfone. As a result, Radiofone contends, SCB has made "... substantial progress in the destruction of Mobilfone's IMTS service ..." because, without selector level interconnection, Mobilfone has found it necessary to increase its investment and charge higher rates. This experience, Radiofone argues, proves that the practices of SCB (directed toward both Mobilfone and Radiofone) are destructive of competition and a restraint of trade.

16 "Outpulsing" is a term used in connection with selector level interconnection. The two terms are loosely used in an interchangeable manner.

15. In a letter dated July 27, 1978, the Commission's Mobile Services Division staff asked Radiofone if it had offered to pay the costs of central office modifications and other charges involved in furnishing the requested selector level interconnection. Radiofone responded that no such overt offer had been made but that such an implied offer may be inferred from the financial considerations involved. Radiofone states that the installation of selector level interconnection would have permitted Radiofone a savings of $113,010.17 in service charges to its subscribers. 17/ Radiofone also alleges that, faced with the complete refusal by SCB to furnish selector level interconnection, Radiofone never had the opportunity to discuss the details of its proposal, including its willingness to pay for central office installation charges. Radiofone further points out that it has had contracts with SCB, for extensive amounts of equipment on a continuing basis since 1960 and has consistently honored all charges made by SCB. Under the circumstances, Radiofone argues, its order for selector level IMTS service was tacitly and legally an agreement to pay the applicable charges.

16. Radiofone also submitted a letter dated November 4, 1974, from SCB to the Louisiana PSC, in which SCB filed a tariff to provide IMTS and thus add selector level interconnection to its own facilities. Radiofone argues that only when SCB had made the decision to improve its own system did it then abandon its previous policy of refusing such interconnection to its competitor, Radiofone.

17. In response, 18/ SCB expresses its confidence that Radiofone would have paid for any reasonable and necessary central office modifications. SCB acknowledges that such matters were not discussed by the two parties because, according to SCB, Radiofone did not propose to use a control terminal designed for two-way mobile radio service. When in 1976 Radiofone submitted such a proposal, SCB states, the requested selector level interconnection was

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17/ Radiofone submitted a cost analysis for each month during the period July 1972 to August 1978, showing charges actually made to subscribers compared to charges which would have been made if selector level interconnection had been installed. The total in additional charges, without interconnection, was $113,010.17. SCB does not dispute or specifically address this cost analysis.

18/ Letter dated October 11, 1978, from SCB to the Bureau staff.

supplied. SCB asserts that Radiofone's contentions are premised on the erroneous belief by Radiofone that it could have used the same type of control terminals for two-way mobile radio communications that Radiofone was using in 1970 for paging. Radiofone, on the other hand, argues that when SCB supplied selector level interconnection in 1976, there was no central office conversion cost, merely standard trunk and tie-line charges amounting to less than $500.00 (which Radiofone would have been satisfied to pay); moreover, SCB informed Radiofone at that point that these trunks were suitable for use with both paging and mobile communications. In Radiofone's view, these facts contradict SCB's earlier claim that selector level interconnection was not available.

18. The 1970 letter from SCB (paragraph 10 above), in response to Radiofone's request, did not elaborate beyond the merely conclusory statement that selector level interconnection was "not available." In its October 11, 1978 response to the Bureau staff's inquiry, SCB provides no specifics as to how Radiofone's 1970 proposal was technically unacceptable; 19/ moreover, when SCB provided selector level interconnection to Radiofone in 1976, SCB informed Radiofone that both paging and two-way mobile communications could be provided. This statement appears to contradict the SCB contention that Radiofone's earlier request was defective for failure to propose two-way mobile radio service. These matters raise substantial questions as to whether SCB wrongfully refused to furnish Radiofone selector level interconnection either (1) by misrepresenting facts to Radiofone as to the availability of selector level interconnection or (2) by refusing to

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19/ SCB claims that, given the state of the art in 1970, when Radiofone originally requested interconnection, it was the belief of SCB that selector level interconnection was possible for a two-way mobile radio system but not for one-way communications. SCB further contends that Radiofone presented no detailed proposal in 1970 which might have demonstrated that, contrary to the impression of SCB, it was in fact technically feasible to provide the interconnection desired. Radiofone contends that, given the complete refusal by SCB, Radiofone never had the opportunity to discuss details.

discuss the details of Radiofone's proposal, thereby precluding the possibility of arriving at a mutually acceptable arrangement. We will therefore add a Section 201 issue to determine whether SCB can justify its past failure to provide selector level interconnection to Radiofone. 20/ If SCB cannot provide such justification, the Commission can then determine whether the evidence presented also demonstrates any anticompetitive practices on the part of SCB. Accordingly, we will add an anticompetitive practices issue (separate from a Section 201 issue). Similar allegations have been made in protests against other SCB applications. (File Nos. 20089-CD-P-(4)-79 and 20309-CD-P-(2)-79)). We will condition any action taken with respect to these applications on our findings in this proceeding.

19. Anticompetitive Practices of the Bell Telephone System. Radiofone brings to our attention two cases wherein it claims the rates for paging service provided by Bell System affiliates were found to be noncompensatory. 21/ It claims that these cases demonstrate a course of conduct of anticompetitive activity on the part of American Telephone and Telegraph Company (AT&T) and its subsidiaries. We find that two instances of noncompensatory rates on the part of two AT&T operating companies 22/ do not warrant an issue of anticompetitive conduct on the part of SCB. Two instances of noncompensatory rates do not, in our view, warrant the inference that there might exist a pattern of anticompetitive conduct attributable to SCB. Accordingly, we see no reason for including in the hearing a general issue of anticompetitive practices of the Bell Telephone System. However, we have determined to investigate the specific alleged anticompetitive interconnection practices of SCB, as discussed in paragraph 18 above.

20/ Radiofone's allegations concerning Mobilfone in Baton Rouge are unsupported by cost factors, correspondence between parties involved, or other evidence of anticompetitive practices.

21/ California PUC Decision No. 85356, January 20, 1976; Massachusetts DPU No. 18090, May 13, 1977.

22/ New England Telephone and Telegraph Company and Pacific Telephone and Telegraph Company. The two State Commissions concluded that the rates in question were noncompensatory but made no findings of anticompetitive practices.

20. Except as otherwise noted above, we find SCB to be legally, technically, financially, and otherwise qualified to construct the proposed facilities. In view of the foregoing, IT IS ORDERED, That the petitions to deny and supplements filed thereto by James D. and Lawrence D. Garvey d/b/a Radiofone ARE GRANTED IN PART and DENIED IN PART as set forth above.

21. IT IS FURTHER ORDERED, That, pursuant to Sections 202 and 309 of the Communications Act of 1934, as amended, the above-captioned applications of South Central Bell Telephone Company, File Nos. 21780-CD-P-(4)-75 and 20437-CD-P-(13)-75, ARE DESIGNATED FOR HEARING in a consolidated proceeding upon the following issues:

(a) to determine whether SCB has demonstrated public need for the proposed New Orleans facilities in Houma and in New Orleans and has complied with Rules Section 21.516;

(b) to determine whether SCB has violated Section 201(a) or (b) of the Communications Act by wrongfully refusing to provide selector level interconnection to Radiofone;

(c) to determine whether the evidence adduced at the hearing pursuant to issue (b) demonstrates anticompetitive practices by SCB; and

(d) to determine, in light of the evidence adduced at the hearing pursuant to the foregoing issues, whether the public interest, convenience and necessity would be served by a grant of the above-captioned applications, with or without additional conditions.

22. IT IS FURTHER ORDERED, That the burden of introduction of evidence and the burden of proof on issue (a) and (d) are on SCB; and the burden of introduction of evidence and the burden of proof on issues (b) and (c) are on Radiofone.

23. IT IS FURTHER ORDERED, That SCB, Radiofone, and the Commission's Common Carrier Bureau ARE MADE PARTIES to this proceeding.

24. IT IS FURTHER ORDERED, That the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent order.

25. IT IS FURTHER ORDERED, That parties may avail themselves of the opportunity to be heard by filing with the Commission pursuant to Section 1.221 of the Rules within 20 days of the release date hereof, a written notice stating an intention to appear.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
SOUTH CENTRAL BELL TELEPHONE COMPANY	)	CC Docket No. 79-250 File No. 21870-CD-P-(4)-75
	)	
For construction permit for modification of DPLMRS STATION KKI454 at Houma, Louisiana, to replace equipment, add channels, and to furnish Improved Mobile Telephone Service	)	
	)	
SOUTH CENTRAL BELL TELEPHONE COMPANY	)	CC Docket No. 79-251 File No. 20437-CD-P-(15)-75
	)	
For a construction permit for modification of DPLMRS station KKD292 at New Orleans, Louisiana to add channels and to furnish Improved Mobile Telephone Service	)	

To: Administrative Law Judge James F. Tierney

MOTION TO ENLARGE ISSUES

Radiofone, Inc., formerly James D. and Lawrence D. Garvey d/b/a Radiofone, by its attorneys and pursuant to Section 1.229 of the Commission's Rules and Regulations, 47 C.F.R. §1.229, hereby moves the presiding judge tc enlarge the issues in the captioned proceeding to include an inquiry into whether South Central Bell Telephone Company (SCB) has acted anticompetitively by charging noncompensatory rates for its mobile services and by cross-subsidizing between its competitive mobile telephone offerings and its monopoly

general telephone services. In support thereof Radiofone respectfully shows the following:

1. Section 1.229 of the Rules provides that "[m]otions for modification of issues which are based on . . . newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party." 47 C.F.R. §1.229(b). The instant motion is based on facts that were not discovered by Radiofone until February 25, 1980--the date on which counsel for Radiofone received SCB's "Further Answers to Set 'A' of Written Interrogatories of Radiofone, Inc. to South Central Bell Telephone Company" (Answers). Moreover, the facts here relied on are contained solely in internal SCB documents which SCB previously refused to produce. Accordingly, "it was not possible to file the motion" earlier. 47 C.F.R. §1.229(b). Because these facts could not reasonably have been learned earlier by Radiofone, and because Radiofone has promptly come forward within 15 days of learning such facts, the instant motion is timely and should, therefore, be considered fully on its merits.

2. There would be further basis for full consideration of this motion even if it were not timely. Section 1.229 also provides that a "motion to enlarge will be considered fully on its merits if . . . initial examination of

the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." 47 C.F.R. §1.229(c). As more fully set forth herein, the instant motion demonstrates that SCB has engaged in the practice of allowing the rates for its mobile telephone services--services in which it competes with Radiofone and other radio common carriers--to remain at anticompetitive, noncompensatory levels. Moreover, to make up for the shortfall, SCB has looked to revenues from its general landline telephone services--monopoly services, immune from competition. These are clearly matters of "decisional significance" and "public interest importance." For the Commission must find that the public interest would be served before it can grant the captioned applications of SCB. See Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a). Given the allegations set forth in this motion--allegations based entirely on admissions by SCB--such a public interest finding cannot be made without a full hearing on the question of whether SCB has acted in an unlawful and anticompetitive manner with respect to its rate practices and, if so, whether SCB possesses the requisite character qualifications to hold a radio authorization. See United Telephone Company of Ohio, 26 F.C.C.2d 417 (1970); Bonduel Telephone Company, 68 F.C.C.2d 497 (1978); see also Radio Relay Corp. v.

FCC, 409 F.2d 322 (2d Cir. 1969).

3. As explained in paragraph 1, above, SCB recently served its Answers on Radiofone. Exhibit K to those answers consists of various internal SCB letters and memoranda.*/ SCB had previously refused to produce these documents, but production was ultimately compelled by an order of the presiding judge, FCC 80M-148, released January 25, 1980. Radiofone had requested production of

> all of the papers which document the considerations of the various SCB officials and employees involved in devising and adopting the "objective to convert all [SCB] manual and flat rate mobile systems to" IMTS, which was described to the Louisiana PSC as having been adopted in 1971.

It was Radiofone's position--a position endorsed by the presiding judge's January 25 order--that this request was reasonably calculated to lead to admissible evidence on the already designated, although limited, anticompetitive issue whether SCB had wrongfully refused Radiofone trunk level interconnection for its automatic dial services until SCB could get its own IMTS system developed. While this was Radiofone's objective in requesting the documents, a mere cursory examination of the materials produced makes it clear

*/SCB also tendered, as part of Exhibit K, two sets of documents ostensibly containing proprietary and competitive information with a special request that their disclosure and use be limited. For the purposes of this motion, Radiofone does not rely on any item from those two sets of documents.

that a separate set of issues is now indicated--indeed mandated if the Commission is to fulfill its obligation of finding that issuance of a radio authorization would be in the public interest.

4. The documents produced in Exhibit K to the Answers make clear, on their faces, the following:

(a) SCB was charging in 1971, and for several years previously, mobile telephone rates that were non-compensatory;

(b) SCB was using revenues from its general telephone service (as to which it enjoyed a monopoly) to subsizide its Louisiana mobile telephone service (as to which it competed with radio common carriers); and

(c) One reason for SCB's decision to convert to IMTS was that it could then achieve a rate increase without providing a cost study for its manual service--a study which would have disclosed its noncompensatory rates and unlawful cross-subsidization.

5. In a letter dated October 20, 1969 (copy attached hereto as Exhibit A), Murry C. Ficher wrote to W.R. Bunn that "[f]or quite some time now, New Orleans mobile service has been operating in the red. Increased mobile telephone operating costs of the late 1960's have far

outstripped Louisiana's 1946 mobile telephone rates." It is not surprising that SCB found its rates inadequate--in New Orleans they had remained virtually unchanged since 1946. Competitors, such as Radiofone, had to raise their rates when inflation increased operating and equipment costs. But not SCB. In a memorandum entitled "Mobile Telephone Service in Louisiana" (copy attached hereto as Exhibit B) it was noted: "Obviously, we have been increasing basic exchange rates to keep pace with inflation, increasing operating costs, interest rates, etc. However, we have been overlooking these same factors in other services, such as mobile telephone." The noncompensatory nature of SCB's mobile rates was widely known within the telephone company. On July 9, 1971, J.R. Wilson wrote a letter to D.E. Buck (copy attached hereto as Exhibit C) in which he referred to SCB's mobile operations as "an unprofitable service." In a letter written three days earlier (copy attached hereto as Exhibit D), M.P. Green, Jr. wrote: "we are 'losing our shirts' on [manual mobile service] every year we leave it at present rate levels." John L. Marcum echoed these words in a July 20, 1971, letter (copy attached hereto as Exhibit E) when he wrote: "we are losing money on it every year we leave it at present rate levels." And in the memorandum previously referred to (Exhibit B) it was noted that an April, 1969, study had placed "the rate of return for manual

mobile service [at] minus 5.7%."

6. One necessarily wonders why SCB, or any company, would not raise rates determined to be unprofitable. The documents attached as Exhibits A through E hereto provide some answers. SCB was concerned that "customer ill will . . . might result." (Exhibit B) SCB realized that its manual mobile service was "less-than-desirable" (Exhibit A) and that the "quality of our present service makes increasing charges on the manual service impractical." (Exhibits D and E) Moreover, SCB did "not want to jeopardize our pending request for a general rate increase with an ill-timed request for mobile telephone rates." (Exhibit A) But the most enlightening insight into SCB's determination to retain its noncompensatory rate structure are the statements made by someone at SCB that "Rates charged by our competition--the Radio Common Carriers--also indicate that we are under-pricing mobile telephone service" and that SCB's "rates should be lower than those of the local R.C.C." (Exhibit B)

7. But even more important then why SCB did not increase its mobile telephone rates is the question how it was able not to. The answer is that SCB, unlike its radio common carrier competitors, had revenues from its monopoly landline telephone services which could be used to

compensate for the losses on its competitive mobile services. Indeed, a July 15, 1971 letter from M.P. Greene, Jr. to D.E. Buck (copy attached hereto as Exhibit F) noted that it "might be embarrassing if it is brought out that the general subscriber body is subsidizing mobile." (emphasis added) When a competing and law-abiding carrier, such as Radiofone, finds that its revenues do not cover its costs, it has two choices: it can cease operations or it can raise its rates. SCB, on the other hand, has yet a third, albeit unlawful, alternative. It can continue to charge anticompetitively low, noncompensatory rates and look to the unsuspecting public who subscribe to its monopoly landline services to make up the difference. Since the landline service is a monopoly, a rate increase there is virtually immune from the usual economic effect of a corresponding decrease in demand. An increase in competitive mobile rates, on the other hand, would result in many SCB subscribers turning to radio common carriers. This ability to cross-subsidize between competitive and monopoly services, when exploited, places competing carriers, such as Radiofone, at a severe competitive disadvantage. Radiofone fully appreciates the gravity of the cross-subsidization charge now leveled against SCB. But the overwhelmingly persuasive evidence of such activity is found in the admissions of SCB itself. Not only is there the July 15, 1971, letter previously mentioned

(Exhibit F), SCB has also admitted, internally, its practice of compensating for its mobile service losses by "increases in other services that are already profitable." (Exhibit B)

8. A perusal of the documents provided in Exhibit K to SCB's Answers also indicates that at least one reason for SCB's determination to convert to IMTS was so that it could avoid "furnishing cost studies, which could prove embarrassing." (Exhibit B) SCB found itself in a Catch 22. It needed to increase its mobile rates because it was "getting pressure through the Commission and from the RCC's in the state to investigate our rates." (Exhibit F) But a rate increase would require making public cost studies which would uncover the unlawful noncompensatory rates and the anticompetitive cross-subsidization. So SCB decided to convert to IMTS. In this way it could provide cost studies for the proposed IMTS, not the existing manual service, and thereby "avoid disclosure of the [negative] rate of return for the [manual] service." (Exhibit B)

9. It would be an understatement to say that the matters here raised present a substantial issue of material fact as to whether SCB has engaged in unlawful practices. In charging noncompensatory rates and cross-subsidizing